Initial Discovery Protocols for Employment Cases Alleging Adverse Action

Report on a Pilot Project to the Judicial Conference Advisory Committee on Rules of Civil Procedure

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Executive Summary

This report presents findings from a multi-year effort to study pattern disclosures in employment discrimination cases. In November 2011, a task force of plaintiff and defense attorneys, working in cooperation with the Institute for the Advancement of the American Legal System (IAALS), released a pattern discovery protocol for adverse action employment cases. The task force intended the protocol to underpin a pilot project to reduce costs or delays in a subset of cases. About 75 judges nationwide have adopted the protocols; in some districts, multiple judges have used them.

The Judicial Conference Advisory Committee on Rules of Civil Procedure asked the Federal Judicial Center (FJC) to study and report on the pilot project. FJC researchers have identified more than 900 terminated pilot cases. For purposes of comparison, a sample of employment discrimination cases was drawn from approximately the same termination cohorts. Researchers collected data on case disposition times and types and on motions activity. Key findings include the following:

- Overall, pilot cases did not terminate faster than randomly selected comparison cases that were similar in disposition types to the pilot cases.
- In terms of overall disposition times, employment discrimination cases take about 10–11 months to resolve, at the median.
- The case disposition types for pilot cases and comparison cases were very similar.
- The average number of discovery motions filed in pilot cases was lower than the average number of discovery motions filed in comparison cases.

This is the second FJC report on this pilot project. The first was published in 2015.[1]

1. *See* Emery G. Lee III & Jason A. Cantone, Federal Judicial Center, Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (2015), *available at* https://www.fjc.gov/sites/default/files/2016/Discovery%20Protocols%20Employment.pdf.

Background on the Pilot

In May 2010, the Judicial Conference Advisory Committee on Rules of Civil Procedure sponsored the Civil Litigation Review Conference at Duke University School of Law. The conference was prompted by the perception that cost and delay in civil litigation called for a reevaluation of the Federal Rules of Civil Procedure. One idea that arose from the conference was that pattern disclosures in certain types of civil cases could streamline the discovery process and thus reduce delays and costs.

To demonstrate the feasibility of this idea, a task force of plaintiff and defendant attorneys with experience in employment matters developed pattern initial disclosures. The final result of this effort was the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action. Joseph Garrison chaired the plaintiffs' subcommittee, and Chris Kitchel chaired the defendants' subcommittee. District Judge John G. Koeltl (S.D.N.Y.) and IAALS and its director, Rebecca Love Kourlis, facilitated the committee's meetings. At the time, Judge Koeltl chaired the civil rules subcommittee charged with following up on proposals made at the Duke conference. The protocols were finalized in November 2011 and posted, along with a standing order and a protective order, to the FJC's public website.[2] Judges were encouraged to adopt the protocols for use in a subset of adverse action employment discrimination cases. Since 2011, about 75 judges nationwide have participated in the pilot project. In some districts, including the District of Connecticut, multiple judges have participated.

The introduction of the protocols states the pilot's purpose:

> The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use [as] a basis for discussion.[3]

2. Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action, *available at* https://www.fjc.gov/sites/default/files/2012/DiscEmpl.pdf.

3. *Id.* at 2.

Study Design

At multiple times since spring 2015, FJC researchers searched court electronic records to identify cases that participating judges have included in the pilot.[4] The most recent search was conducted in February 2018. These searches use key words drawn from the standing order made available as part of the protocols. Though the key word strategy does not guarantee that every pilot case is found, it has identified a total of 905 terminated pilot cases during the study period. Most of the pilot cases identified were filed in the District of Connecticut (64%). The District of Arizona accounts for 19% of identified pilot cases, the Southern District of New York, 8%, the Southern District of Texas, 5%, and the Northern District of Ohio, 3%. For analysis purposes, interdistrict transfers, remands to state court, and default judgments were excluded, yielding 869 pilot cases for analysis.

In May 2018, a comparison sample of terminated employment discrimination cases was drawn from the civil Integrated Data Base (IDB). The comparison cases were selected randomly from a pool based on nature of suit code (442), origin (original proceedings and removals from state court), disposition type (interdistrict transfers, remands to state court, and default judgments were omitted), and year of filing (2011–2017). Employment discrimination cases from districts with judges participating in the pilot were excluded from the sampling frame. The comparison sample includes cases from 82 districts, although no single district accounts for more than 5% of the comparison cases. Prior to coding, the comparison sample included 892 civil cases meeting the sampling criteria. After coding, 19 sampled cases were excluded (e.g., class actions) to yield 873 comparison cases.

4. The authors would like to thank George Cort, Sydney Smith, and Melissa Whitney for their assistance with this project.

Disposition Times and Types

The disposition times for pilot cases should provide some evidence whether the pilot's pattern discovery reduces cost and delay. Delay is a function of time from filing to termination, and higher costs are, broadly speaking, associated with longer disposition times.[5]

The pilot cases analyzed in this report, however, do not have shorter disposition times than the randomly selected comparison cases. As seen in the last row of Table 1, overall, the median disposition time for pilot cases is 11.5 months (N = 869), and the median disposition time for comparison cases is 10.2 months (N = 873). That difference in medians is statistically significant (p = .001). The same relationship exists for sample means. An independent samples T-test for difference of means confirms that, overall, pilot cases take longer on average, 14.8 months, than comparison cases, 11.5 months (p < .001).

Moreover, pilot cases have longer disposition times than comparison cases for each disposition type, as seen in Table 1. The median disposition time for pilot cases terminating by settlement is 11.1 months; for comparison cases, the median disposition time for settlements is 10.4 months. The median disposition time for pilot cases that terminate in a voluntary dismissal is 8.8 months versus 7.7 months for comparison cases. The median disposition time for pilot cases terminating by Rule 12 order is 9.8 months versus 7.8 months for comparison cases. The median disposition time for pilot cases terminating by summary judgment is 23.5 months versus 17.5 months for comparison cases. The median disposition time for pilot cases with a trial disposition is 25.3 months versus 20.8 months for comparison cases. The median disposition time for pilot cases terminating in some other way is 6.4 months versus 5.3 months for comparison cases.

The observed longer disposition times for pilot cases is not a result of a different mix of disposition types. As Table 1 makes clear, the pilot and comparison samples are similar in the distribution of disposition types. Settlements account for 48% of pilot dispositions and 45% of comparison dispositions; voluntary dismissals, 25% and 27%, respectively; Rule 12 motions, 7% and 8%, respectively; summary judgment, 13% and 14%, respectively; trial (bench or jury), 2% and 1%, respectively; and other dispositions, 6% and 5%, respectively.

Excluding the District of Connecticut—the district with the most terminated pilot cases—from the analysis does not alter the finding that pilot cases are not resolved more quickly than comparison cases. Pilot cases outside of the District of

5. *See*, *e.g.*, Emery G. Lee III & Thomas E. Willging, Federal Judicial Center, Litigation Costs in Civil Cases: Multivariate Analysis (2010), *available at* https://www.fjc.gov/sites/default/files/2012/CostCiv1.pdf.

Connecticut have an observed median disposition time for pilot cases that is longer than for that of comparison cases, 10.6 months to 10.2 months, although that difference of medians is not statistically significant ($p = .273$). An independent samples T-test for difference of means shows, however, that pilot cases outside of the District of Connecticut take longer on average (13 months) than comparison cases (11.5 months) ($p < .01$).

The same pattern holds when comparing the pilot cases to employment discrimination cases, generally. The civil IDB maintained by the FJC provides case disposition times for civil cases.[6] For civil cases with the nature-of-suit code for employment discrimination cases (442) during the same period (termination years 2011 through first quarter of 2018), applying the same general filters (e.g., excluding remands to state court), the median time to disposition for all employment discrimination cases (N = 71,795) is 10.9 months. This is shorter than the median time to disposition for pilot cases, 11.5 months, but slightly longer than the disposition time observed for pilot cases outside of the District of Connecticut, 10.6 months, by 0.3 months (about nine days).

In short, these findings do not support the conclusion that the pattern discovery at the heart of the employment pilot results in shorter case disposition times.

6. IDB datafiles can be accessed at https://www.fjc.gov/research/idb.

Motions Activity

Assuming that filing and responding to motions imposes costs on parties, motions activity can be used as an indirect measure of litigation costs. Pattern disclosures may reduce discovery motions practice by focusing the parties' subsequent discovery requests and minimizing opportunities for gamesmanship in the discovery process. Gamesmanship through the filing of unnecessary motions is clearly connected to costs. To capture any such effects, the study design included a count of discovery motions. This count was limited to motions to compel, motions for protective orders, and motions for discovery sanctions. Motions to extend discovery deadlines were not counted. These counts included stipulated or agreed-to motions for protective orders.

Discovery motions are less common in pilot cases than in comparison cases, although such motions are not filed in the typical case. Discovery motions were filed in 22% of pilot cases and in 31% of comparison cases ($p < .01$). The average number of discovery motions filed for both pilot and comparison cases is less than one per case, but pilot cases average fewer discovery motions per case, .359, than comparison cases, .503 ($p < .01$). The same result is obtained excluding the District of Connecticut from the analysis. Pilot cases outside of that district (N = 366) have, on average, fewer discovery motions (.298) than comparison cases, .503 ($p < .01$).

In addition, data were collected on the incidence of the filing of four specific kinds of motions in pilot and comparison cases. For the most part, there is little difference between the two samples in terms of motions activity. This data is summarized in Table 2. Rule 12 motions (typically motions to dismiss) were filed in 33% of pilot cases and 29% of comparison cases. Summary judgment motions were filed in 22% of pilot cases and 25% of comparison cases. More than one motion for summary judgment—whether a cross-motion or a second motion—was filed in 2% of pilot cases and 3% of comparison cases. Motions to compel discovery were filed in 10% of pilot cases and 12% of comparison cases.

The last row in Table 2 shows that motions for protective orders were filed in 12% of pilot cases and 25% of comparison cases, which is a sizeable difference. This is a bit misleading, however, because the District of Connecticut typically entered the pilot's model protective order, without motion, shortly after the filing of the case. Presumably, parties would rarely file a motion for a protective order after the entry of one—such motions were filed in only 7% of that district's pilot cases, compared to 19% of pilot cases in other districts. On the other hand, motions to compel were much more likely to be filed in the District of Connecticut, 14%, than in pilot cases outside that district, 5%. The pilot's initial disclosures in the District of Connecticut did not reduce the filing of motions to compel relative to other districts.

Discussion

The findings summarized in this report are not consistent with a conclusion that the pilot's initial disclosures expedite employment discrimination cases compared to similar cases not included in the pilot. Pilot cases generally had longer disposition times than comparison cases. Even after excluding the district with the most pilot cases, pilot cases were not resolved faster than comparison cases. This finding is in agreement with the 2015 report on the pilot, which concluded that "[t]he pilot does not, in short, appear to have an appreciable effect on reducing delay."[7]

One factor to consider is that the median employment discrimination case takes about 10–11 months to resolve, from filing to disposition. Despite the existence of pattern initial disclosures, some discovery—the taking of one or more depositions, for example—is likely to take place in pilot cases. Taking into account the time needed to plan for and conduct subsequent discovery, it may be difficult to systematically reduce case disposition times through initial disclosures. Of note, these findings come from analyses of cases in the pilot and a comparison sample of similar cases not in the pilot. We did not examine differences between pilot and non-pilot cases for individual judges or districts. This is partly because the number of pilot cases connected to any individual judge (or most of the districts) is too small to allow for valid statistical analysis.

The findings on motions practice are difficult to interpret. Pilot cases, both in general and in cases filed outside of the District of Connecticut, saw fewer discovery motions than comparison cases, and discovery motions were filed in fewer pilot cases. Some of that difference is accounted for by the higher incidence of motions for protective orders in comparison cases. The pilot's model protective order likely functions to reduce subsequent motions for protective orders, especially in the District of Connecticut. Such motions are often not contested. Stipulated motions certainly represent costs to the parties, but it seems unlikely that stipulated motions were the focus of the proponents of the pilot project. Moreover, it is less clear whether the relatively low rate of filing of motions to compel in pilot cases filed outside of that particular district are related to the pilot itself or to other case-management techniques employed by the judges who adopted the protocols. Judges employ varying techniques to resolve discovery disputes, so motions counts are a somewhat flawed measure. Indeed, many discovery disputes are never brought to the attention of the trial judge at all, making it a difficult concept to operationalize.

7. Lee & Cantone, *supra* note 1, at 4.

Table 1: Disposition Times by Disposition Type for Pilot Cases (N = 869), Pilot Cases Excluding the District of Connecticut (366), and Comparison Cases (873)

Type of Disposition	Pilot Dispositions (%)	Pilot excluding D. Conn. (%)	Comparison Dispositions (%)	Pilot Median Time to Disposition (months)	Pilot excluding D. Conn. (months)	Comparison Median Time to Disposition (months)
Settlement	48%	53%	45%	11.1	10.0	10.4
Voluntary dismissal	25%	24%	27%	8.8	7.6	7.7
Rule 12 motion	7%	4%	8%	9.8	9.1	7.8
Summary judgment	13%	13%	14%	23.5	20.6	17.5
Trial	2%	2%	1%	25.3	18.0	20.8
Other	6%	4%	5%	6.4	11.2	5.3
All	100%	100%	100%	11.5	10.6	10.2

Table 2: Filing Rates for Dispositive and Discovery Motions

Type of Motion	**Pilot Cases (869)**	**Comparison Cases (873)**
Motion to dismiss	33%	29%
Motion for summary judgment	22%	25%
More than one motion for summary judgment	2%	3%
Motion to compel	10%	12%
Motion for protective order	12%	25%